Mailed 5/4/99

In the Matter of:	*	
	*	
Cleveland E. St. Jacques	*	
Claimant	*	
	*	
against	*	
	*	Case No.: 1998-LHC-0990
General Dynamics Corporation	*	
Employer/Self-Insurer	*	OWCP No.: 1-50829
	*	
and	*	
	*	
Director, Office of Workers'	*	
Compensation Programs,	*	
U.S. Department of Labor	*	
Party-in-Interest	*	

APPEARANCES:

Carolyn P. Kelly, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER ON MODIFICATION - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 2, 1998 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**

ALJ EX 8	Attorney Hyman's August 14, 1998 letter advising the parties that the Director, OWCP, will not be participating herein	12/03/98
CX 1	Attorney Kelly's letter filing the	12/24/98
CX E	December 21, 1998 letter from Claimant's current employer	12/24/98
RX 6	Attorney Quay's letter filing the	02/01/99
RX 7	December 23, 1998 Supplemental Report of Kent S. Moshier, M.S., CRC	02/01/99
CX 2	Attorney Kelly's letter requesting an extension of time for the parties to file their post-hearing briefs	02/08/99
ALJ EX 9	This Court's **ORDER** granting such extension	02/08/99
CX 3	Claimant's brief	03/18/99
RX 8	Employer's brief	04/02/99

The record was closed on April 2, 1999 as no further documents were filed.

Procedural History

Administrative Law Judge Anastasia T. Dunau, by **Decision and Order** filed on May 14, 1984 (RX 1), concluded, **inter alia**, that Cleveland E. St. Jacques ("Claimant" herein), had been injured in the course of his maritime employment at the Employer's shipyard on August 14, 1980 and Judge Dunau awarded Claimant benefits for his temporary total disability from August 15, 1980 through October 17, 1983 and permanent partial benefits, commencing on October 18, 1983, at the compensation rate of $47.67 per week. Claimant's average weekly wage was determined as $216.16 and the weekly partial benefits of $47.67 reflected the loss of wage-earning capacity as found by Judge Dunau. The Employer was awarded Section 8(f) relief and the Special Fund assumed the payments to the Claimant after the Employer paid 104 weeks of permanent benefits and the Special Fund has terminated payments to Claimant.

Summary of the Evidence

Claimant who was born on October 26, 1958 worked at the Employer's shipyard from June 4, 1979 as a pipefitter and he remained in that job classification until he left the shipyard on April 12, 1985 due to a reduction in force. According to his Social Security Administration earnings records, Claimant then completed an electronics course at Technical Careers Institute and he received a certificate in electronics repair. Around Valentine's Day of 1990 he began working as a maintenance painter for the Madison Board of Education in Madison, Connecticut. He was paid an hourly wage of $11.34 and earned $20,343.42 in 1990 and only $13,083.16 in 1991 as that job was eliminated from the school's budget. Claimant's job was created six months earlier and was held by his cousin. The job was set up to assist and support the custodians and Claimant basically painted walls, doors, door casings and other such items at all six (6) schools of the Madison system. Claimant returned to work as a house painter, earning $10,993.00 in 1993 and $9,762.50 in 1994. No other wages are reflected on the SSA wage records. (CX C)

On March 5, 1998 Claimant began working as an entry level fabricator for Welding Works; he worked eighteen (18) hours the first week and earned $10.50 per hour at the start. He has since received a raise and now earns $12.00 per hour. He has learned how to live and work with his weakened shoulder condition and also occasionally experiences a flare-up of his back pain. He has trouble performing overhead work and he has to ask for help in performing work that he cannot perform. The Special Fund terminated Claimant's weekly benefits on or about March 21, 1996, apparently as a result of the LS 200s filed by Claimant showing his post-injury earnings. Claimant was out of work for three (3) weeks this past summer, did not file for or receive unemployment benefits and was paid partial wages by his employer at $23.00 per week. (CX E) Claimant knows his own physical limitations and he has to work at his own pace and his employers over the years have made accommodations for his impairment. (TR 25, 31-32) Claimant's wages at Welding Works from March 7, 1998 through June 20, 1998 are in evidence as RX 3. Claimant earned $8,460.00 in 1996. (CX B)

Dr. Hubert B. Bradburn, an orthopedic specialist, examined Claimant on September 23, 1998 and the doctor, finding Claimant's condition essentially unchanged, reported that Claimant's x-rays of the shoulder showed "a deformity of the proximal humerus laterally where the subscapularis tendon was reinserted and there was a mild deformity of the glenoid." According to Dr. Bradburn, "the amount of instability at the present time would not suggest that the patient should have any further surgery on the shoulder but it is quite possible that instability may develop in the future and he might possibly need a stabilization arthroplasty of the left shoulder." (CX A)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his left shoulder syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing

condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As already noted above, Judge Dunau concluded that Claimant's left shoulder problems began with his August 14, 1980 shipyard accident and Judge Dunau awarded Claimant, **inter alia**, benefits for his temporary total disability and then for his permanent partial disability. The Employer, alleging that Claimant's condition has now changed, has filed a **Motion for Modification** and the hearing on that motion was held on December 2, 1998.

Section 22 of the Act

Section 22 provides the only means for changing otherwise final compensation orders. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. Section 22, as amended by the 1984 Amendments, states that "any party-in-interest" includes an Employer or Carrier granted relief under Section 8(f) and that the section applies to cases under which payments are being made by the Special Fund. Also, the 1984 amended version specifically provides that the section does not authorize the modification of settlements. The effective date of the amended Section 22 is specified in Section 28(3)(1) of the Amendments, 98 Stat. at 1655. **See Brady v. J. Young & Co.**, 18 BRBS 167, 170 n.5 (1985) (**Decision on**

Reconsideration); **Lambert v. Atlantic & Gulf Stevedores,** 17 BRBS 68 (1985).

The scope of modification is not narrowed because the Employer is seeking to terminate or decrease an award. **McCord v. Cephas**, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), **rev'g** 1 BRBS 81 (1974). Section 22 was intended by Congress to displace traditional notions of **Res Judicata**, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459, **reh'g denied,** 404 U.S. 1053 (1972); **McCarthy Stevedoring Corp. v. Norton**, 40 F.Supp. 960 (E.D. Pa. 1940).

A request for modification need not be formal in nature. It simply must be a writing which indicates an intention to seek further compensation. **Banks v. Chicago Grain Trimmers Assoc.,** 390 U.S. 459 (1968); **Fireman's Fund Insurance Co. v. Bergeron,** 493 F.2d 545 (5th Cir. 1974), **reh'g denied**, 391 U.S. 929 (1968); **Hudson, supra**, 16 BRBS 367. However, the Benefits Review Board has held that telephone calls to the Deputy Commissioner's office, made within one year of the last payment of compensation, was sufficient to constitute a request for modification as Claimant indicated during those calls that he believed he had suffered a change in condition and was seeking additional compensation. **Madrid v. Coast Marine Construction Company**, 22 BRBS 148 (1989). A deputy commissioner's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a request for modification because the memorandum reflected that claimant was dissatisfied with his compensation. **See also McKinney v. O'Leary,** 460 F.2d 371 (9th Cir. 1972). It is irrelevant whether an action is labeled an application or modification or a claim for compensation as long as the action comes within the provisions of **Banks, supra**, 390 U.S. 459.

Similarly, a Claimant is not required specifically to characterize the modification request as being based on either a change in condition or mistake in determination of fact. **Cobb v. Schirmer Stevedoring Co.**, 2 BRBS 132 (1975), **aff'd,** 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Moreover, an Administrative Law Judge is not precluded from modifying a previous order on the basis of a mistake in fact although the modification was sought for a change in condition. **Thompson v. Quinton Engineers, Inc.**, 6 BRBS 62 (1977); **Pinizzotto v. Marra Bros., Inc.**, 1 BRBS 241 (1974). **See also O'Keefe v. Aerojet-General Shipyards, Inc.**, 404 U.S. 254, 92 S.Ct. 405 (1972), **reh'g denied**, 404 U.S. 1053, 92 S.Ct. 702 (1972); **McDonald v. Todd Shipyards Corp.**, 21 BRBS 184 (1988).

Modification based on a change in condition is granted where the Claimant's physical condition has improved or deteriorated following entry of the award. The Board has stated that the physical change must have occurred between the time of the award

and the time of the request for modification. **Rizzi v. The Four Boro Contracting Corp.**, 1 BRBS 130 (1974).

The party requesting modification due to a change in condition has the burden of showing the change in condition. **See Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168 (1984) (since Claimant's inability to perform his secondary occupation of farming existed at the time of the initial proceeding and the evidence could support the Administrative Law Judge's finding of no increased loss to Claimant's injured hands, Claimant failed to demonstrate a change in condition); **Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983) (Claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensation disability as a result of his back injury). Since the party requesting modification has the burden of proving a change in condition, the Section 20(a) presumption is inapplicable to the issue of whether Claimant's condition has changed since the prior award. **Leach v. Thompson's Dairy, Inc.**, 6 BRBS 184 (1977).

As indicated above, the Benefits Review Board, in a reversal of prior Board precedents, held that a change in Claimant's economic condition also may provide justification for Section 22 modification. In **Fleetwood v. Newport News Shipbuilding & Dry Dock Co.**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), the Board held that Employer should no longer have to compensate Claimant when there has been a change in Claimant's economic condition so that there is no longer a loss in wage-earning capacity. In affirming, the Fourth Circuit rejected the argument that prior cases have held to the contrary. **Finch v. Newport New Shipbuilding and Dry Dock Company,** 22 BRBS 196, 201 (1989); **Vilen v. Agmarine Contracting Inc.**, 12 BRBS 769 1980); **cf. Verderane v. Jacksonville Shipyards, Inc.** 772 F.2d 775, 17 BRBS 154 (CRT) (11th Cir. 1985), **aff'g** 14 BRBS 220.15 (1981); **General Dynamics Corp. v. Director, OWCP**, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), **aff'g sub nom. Woodberry v. General Dynamics Corp.**, 14 BRBS 431 (1981).

It is also well-settled that a modification order decreasing compensation may not affect any compensation previously paid, although Employer is entitled to credit any excess payments already made against any compensation as yet unpaid. A modification order increasing compensation may be applied retroactively if this Administrative Law Judge determines that according retroactive effect to the modification order renders justice under the Act. **McCord, supra,** 532 F.2d at 1381.

Since the issuance of that order by Judge Dunau, the Claimant has returned to work for a variety of Employers. It is the Employer's contention that the Claimant has an increased earning capacity, which is higher than the original earning capacity assigned by Judge Dunau, even after applying a deflation factor. In fact, the Employer contends that the Claimant's current earning

capacity exceeds his original average weekly wage. As such, should any award be issued, it should merely be for a *de minimis* amount.

In the instant case, the Employer contends that the Claimant is earning sufficient income to justify a Modification pursuant to §22 of the Act. Claimant has worked as a painter for the Madison Board of Education in the early l99O's. (TR 27) That job lasted from February l99O through June 1991. (TR 27, 28). This was a full time job. The job came to an end due to budgetary constraints outside of the control of the Claimant. (TR 28, 29)

Following the end of this job, the Claimant resumed working as a self-employed house painter. (TR 29, 33) In this job, he was capable of doing most of the job duties required of a house-painter. (TR 34) If he needed any help, it was readily available.

He continued in that capacity for several years until most recently working in a metal fabrication facility. (TR 29) He is employed on a full-time basis, currently earning $12 per hour. (TR 31) He is also working some overtime at this position. (TR 32)

At the time of his injury, the Claimant was earning $216.66 per week. (RX-1) His current earnings amount to $480 plus overtime weekly. According to his current Employer, this same position paid $5.50 per hour in 1980, plus any overtime. (RX-4-4) Thus, his current earning capacity meets or exceeds $220 per week (the overtime in 1980 was not available). As such, the Claimant's economic circumstances have changed to the degree that his earnings exceed those at the time of the injury, according to the Employer.

The periods in question for the Modification are a) during his tenure at the Madison Board of Education, b) his employment between 1991 and his present employment, and c) his current employment since March 1998. Under "a", the Employer has submitted the Claimant's social security records which reflect what he earned in that position for that period of time. For that period, the Employer contends that Claimant should only receive a *de minimis* award.

Since his current wages, under "c", exceed those he made at the time of his injury, again the Employer contends that he is entitled to a *de minimis* award.

For the intervening period, the Employer has submitted the social security records which represents the Claimant's reportable income. The Claimant testified that he was self-employed as a painter between 1991 and 1998, and so the Employer must rely on the Social Security records as evidence of his income.

On the other hand, Claimant frames the issue herein as follows:

The issue to be addressed in this case is whether the Employer is entitled to a modification of the Administrative Law Judge's Decision and Order dated April 30, 1984 awarding the Claimant permanent partial disability benefits at the rate of $47.67 per week on the ground that the wages he earned for the period from February, 1990 to June, 1991 and from March 1998 to the present while working for the Madison Board of Education and Welding Works, respectively, reflect an increase in his earning capacity constituting a change in conditions under §22 of the Act.

As expected, Claimant submits that the answer is in the negative.

Initially, I note that the Employer has submitted evidence in support of its motion. Accordingly, the **Motion for Modification** is hereby **GRANTED** and I shall now consider the merits of the motion.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable

alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work at his former job at the shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability while he has been unable to return to work.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if

they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

As noted above, Judge Dunau has already concluded that Claimant reached maximum medical improvement on October 17, 1983 and that he has been permanently and partially disabled from October 18, 1983, and such conclusions are binding upon the parties as the “Law of the Case,” except as the findings are modified herein.

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater

compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

A shoulder injury, resulting in an impairment of either or both upper extremities, is not subject to the so-called schedule provisions of the Act. In this regard, **see Grimes v. Exxon,** 14 BRBS 573 (1981).

An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In

White v. Bath Iron Works Corp., 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened shoulder and back condition and that his various employers have allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken many times on this issue and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

At the outset, I must determine (1) whether the evidence supports the Employer’s essential thesis that Claimant’s post-injury wages are substantially greater than his average weekly wage

of $216.16 as of his August 14, 1980 injury and (2) whether this motion comes within the parameters of the landmark decisions of the U.S. Supreme Court in **Metropolitan Stevedore Co. v. Rambo,** 518 U.S. 291, 115 S.Ct. 2144 (1995) (**Rambo I**) and in **Metropolitan Stevedore Co. v. Rambo,** 521 U.S. 121, 117 S.Ct. 1953 (1997) (**Rambo II**).

As was stated in **Rambo I**,

> The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.

Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 115 S. Ct. 2144, 2148 (1995) (Rambo I). "In deciding whether to reopen a case under § 22, a court must balance the need to render justice against the need for finality in decision making:'[T]he basic criterion is whether reopening will "render justice under the act.”’” **General Dynamics Corp. v. Director**, 673 F. 2d 23, 25 (1st Cir. 1982).

In this case, the Employer concedes that there is a probability that Claimant’s physical condition will deteriorate in the future, thus entitling him to at least a *de minimis* award, **Rambo II**. (Tr. at 14) The issue in this case is whether the wages the Claimant received while working for the Madison Department of Education and his present wages reflect an increase in wage-earning capacity entitling the employer to a modification of the prior order based on a change in conditions.

To determine the claimant's post-injury earning capacity under §8(c)(21), the Act provides:

> The wage-earning capacity of an injured employee in cases of partial disability . . . under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h). As noted by one circuit, "[t]he disability award provided for under the Act is designed to compensate

claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime.” **Randall v. Comfort Control Inc.**, 725

In **Rambo I**, the Supreme Court recognized that higher post-injury earnings are not necessarily conclusive of an increase in wage-earning capacity:

> [A]n award in a nonscheduled-injury case may be modified where there has been a change in wage-earning capacity. A change in actual wages is controlling only when actual wages fairly and reasonably represent . . . wage-earning capacity." LHWCA § 8(h), 33 U.S.C. § 908(h) . Otherwise, wage-earning capacity may be determined according to the many factors identified in §8(h)... **This circumspect approach does not permit a change in wage-earning capacity with every variation in actual wages or transient change in the economy**.

Rambo I, 115 S. Ct. at 215((emphasis added). In that case, the court affirmed the ALJ's conclusion that the increased wages reflected an increase in earning capacity because the claimant’s new skills, which enabled him to earn the higher wages, also made him more marketable. (**Id.**)

In **Rambo II**, the Court reiterated that an increase in wages is not necessarily determinative of an increase in wage-earning capacity that would justify a modification. In order to succeed on a modification, the employer must to do more that show an increase in earnings. The employer has the burden of proving that the increase in wages is the result of an increase in wage-earning capacity:

> In a case like this, where the prior award was based on a finding of economic harm resulting from an actual decline in wage-earning capacity at the time the award was entered, the employer satisfies this burden by showing that **as a result of a change in earning capacity** the employee's wages have risen to the level at or above his pre-injury earnings.

Rambo II, 117 S.Ct. at 1964 (Emphasis added)

Claimant’s excellent brief cites a number of cases wherein modification was denied by the presiding Administrative Law Judge or by the Benefits Review Board. However, those cases, in my

judgment, are clearly distinguishable on the basis of Claimant's post-injury wages wherein his Average Weekly Wage as of August 14, 1980 of $216.16 has now increased to $480.00 weekly plus overtime on a fairly regular basis.

Since the Employer has moved for the modification, it is the Employer's burden to prove that the Claimant's wages from the Madison Board of Education reflected an increase in his earning capacity. However, when the **Devillier, supra,** factors are applied to this position, it is clear that the wages the Claimant earned while working for the Madison Department of Education were not indicative of an increase in the Claimant's wage-earning capacity.

First, the Claimant did not obtain or require any new training for this job. He was basically doing the same kind of light-duty painting that he had done while working for his cousin's painting business. The fact that the job paid more than he had previously earned doing the same work for himself had nothing to do with an improvement in his marketability, either through retraining, greater experience or a lessening of his limitations from the injury. His injury continued to preclude him from doing any assignments that required climbing ladders or reaching.

In addition, this was a temporary position that only existed for approximately two years. After the position was eliminated, the Claimant returned to the same light-duty painting work that he had been doing before and his earnings reverted to their prior levels until 1998 when he obtained his current job. This confirms that the increase in wages from the Board of Education job did not reflect a newly-acquired ability to continue to earn higher wages.

Given these facts, it is clear that the Claimant's earnings while working for the Board of Education did not reflect an increase in his earning capacity. However, even if we assume that those wages were an accurate reflection of his wage-earning capacity, it is well-settled that the hourly rate that the Claimant earned in 1990 is not relevant. Rather, the relevant wage is what that school job paid, or would have paid, on the date of injury:

> the wages which the new job **would have paid at the time of injury** are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage earning capacity as a result of his injury. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels **which that job paid at the time of injury**.

Richardson v. General Dynamics Corp., 23 BRBS 327, 330 (1990)(emphasis added). As the Second Circuit has held, "[a]disabled worker's post-injury earnings can only 'fairly and

reasonably represent his wage-earning capacity,' under § 8(h), if they have converted to their equivalent at the time of injury." **LaFaill , supra**, at 61.

The Claimant's job with the Board of Education did not exist on the date of injury. If we assume that the job paid minimum wage on that date ($3.10 per hour according to 29 U.S.C. § 206), then the Claimant's gross wages for a 40-hour week in that job on the date of injury would have been $124 -- substantially less than his average weekly wage of $216.16. Pursuant to the formula under §8(c)(21), the Claimant would be entitled to permanent partial disability benefits at the rate of $61.44 per week for the period that he worked for the Board of Education, $13.77 per week more than was awarded in the prior order. However, no such claim has ever been filed by Claimant.

In view of the foregoing, I find and conclude that the Employer is not entitled to modification of Judge Dunau's compensation award for the years 1990 and 1991 as the Employer has not sustained its burden on this issue for those years. While Claimant points out that he has been undercompensated for those years, any claim therefor is barred by Section 13 of the Act requiring Claimant to file for such benefits within one (1) year of the payment of the last compensation benefits. Moreover, Claimant's wages between June of 1991 and March 3, 1998 likewise do not merit modification as the Employer has not sustained its burden for those years. I also find and conclude that the data submitted by the Employer's vocational rehabilitation counselor, described as a special report - archival information on welder's hourly wages is simply too vague, speculative and generic to support a motion for modification retroactively.

However, Claimant's current job presents a different situation. While Claimant submits that his present wages are not indicative of an increase in his earning capacity, the fact remains that he is currently working as an entry-level fabricator, a job that involves some sheet-metal work.

A statement from the Claimant's present Employer indicates that his current job "probably" paid $5.50 per hour in 1980. Judge Dunau previously found that the Claimant had a post-injury earning capacity of $4.15 per hour because he was limited to sedentary unskilled or semi-skilled employment. Even if we assume that his present wages, as adjusted to the date of injury, are representative of his earning capacity, this still does not justify a modification of the previous order, according to the Claimant's thesis. As the Fourth Circuit noted in **Fleetwood, supra**, a

modification of an order is appropriate where the claimant's wage earning capacity has increased substantially. (**Id**.)

While Claimant's post-injury wages after March 4, 1998 do reflect a significant increase in his wage-earning capacity, I decline to grant the Employer's motion retroactive effect in the interests of justice and fairness for all of the parties.

As noted, the prior Decision and Order Awarding Benefits is dated April 30, 1984. Benefits were paid by the Special Fund until approximately three years ago, when the Fund stopped paying the benefits without an evidentiary hearing in violation of 33 U.S.C. §14(f) and 20 C.F.R. §§ 702.286, 702.350. In March, 1998, the Employer moved for a modification of the prior order. The Claimant has not received any benefits in almost four years.

Section 22 provides that "an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation . . ." 33 U.S.C. § 922. This language has been construed as permitting but not requiring an Administrative Law Judge to give retroactive effect to an order modifying a prior order. In cases in which a retroactive modification reduces the claimant's compensation rate, the employer is only entitled to a credit against future compensation in the amount of the overpayment.

The test for determining whether to give the modification retroactive effect is whether retroactive application will "render justice under the Act." **McCord v. Cephas**, 532 F.2d 1377, 1381 (D.C. Cir. 1976). In that case, the Court strongly suggested that reopening the prior order, or modifying it retroactively, would not render justice under the Act because of the Employer's repeated refusals to comply with the administrative process and the prior order. Similarly, in a case in which the employer unilaterally terminated payment of the claimant's benefits prior to requesting a modification of original order the Administrative Law Judge ruled that giving retroactive effect to the modification he ordered reducing the claimant's compensation rate would not render justice under the Act. **See Ezra v. United Brands Corp**., 17 BRBS 349 (ALJ) (1985).

The same is true in this case. The Employer has conceded that the Claimant is entitled to at least a *de minimis* award. Putting aside the weakness of the Employer's arguments on the merits of reducing the Claimant's benefits at all, this is certainly a case in which retroactive application of a modification would not render justice under the Act. Here, the Special Fund unilaterally

terminated payment of the Claimant's benefits approximately four years ago without a hearing and without requesting a modification. The Employer did not file a motion for modification until March, 1998 and is now seeking a retroactive modification to February, 1990. Given the Special Fund's failure to comply with the prior order, and the Employer's eight year delay in seeking a modification, it would be unjust to penalize the Claimant and reward the Respondents by giving a modification reducing his benefits retroactive effect, according to Claimant.

I agree with the Claimant and I decline to give retroactive effect herein because the Employer and the Special Fund have had ample opportunity to file their motions years ago, especially as the Claimant diligently has filed the Form LS-200s, as required by the 1984 Amendments to the Act, as the Board's decision in **Fleetwood, supra,** was rendered in 1984 and the Supreme Court's decision in **Rambo I** in 1995.

Thus, it would be most unfair and unjust to give retroactive effect herein as far back as January or February of 1980 based on the facts presented herein.

Accordingly, as Claimant, who is now forty (40) years of age, has shown that there is a significant likelihood that his future wage-earning capacity will be adversely affected by his weakened shoulder and back condition, I find and conclude that Claimant is entitled to reinstatement of his benefits for his permanent partial disability in the weekly amount of $47.67 commencing on March 3, 1996, at which time such benefits were unilaterally terminated, and such benefits shall continue until the date of issuance of this decision, at which time Claimant shall be awarded *de minimis* benefits in the weekly amount of $1.00, in compliance with the mandates of **Rambo I and II**.

As the Employer has fulfilled its obligations by paying Claimant 104 weeks of permanent benefits, all of the benefits awarded herein are the responsibility of the Special Fund.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a

disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

The Employer is still responsible for Claimant's medical expenses related to his August 14, 1980 injury, subject to the provisions of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Claimant submits that he is entitled to an award of the so-called penalties provided by Section 14(f) since the Special Fund unilaterally terminated benefits on March 3, 1996.

Section 14(f) of the Act provides:

> If any compensation payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payments has been issued by the Board or court.

33 U.S.C. §914(f). As the Administrative Law Judge noted in **Ezra, supra**, this penalty provision "was intended by Congress to encourage prompt payment of benefits." **Id.** at 356. In that case, the Administrative Law Judge awarded a 20% penalty on all benefits due from the date the Employer unilaterally terminated the Claimant's benefits to the date of his order modifying the benefits.

In **Shoemaker v. Schiavone and Sons, Inc.**, 11 BRBS 33 (1979), the Employer terminated payment of permanent total disability benefits based on a recommendation of the claims examiner following an informal conference that benefits should stop based on the Claimant's medical record. The Employer argued that the Administrative Law Judge erred in assessing a penalty under §14(f) because it terminated the benefits in reliance on the claims examiners recommendation. In affirming the penalty, the Board stated:

> Once an award of compensation has been entered, the employer remains obligated to comply with the terms of the award until a further order directs otherwise . . . Should the employer terminate payments prior to such order, it does so at the risk of incurring liability for an additional assessment under Section 14(f).

Id. at 37.

Assessing a 20% penalty in this case is even more appropriate because the Fund unilaterally terminated the Claimant's benefits without a hearing and without even requesting a modification, according to the Claimant.

I agree with the Claimant and the Special fund shall also pay to Claimant the twenty (20%) percent penalty pursuant to **Lawson v. Atlantic and Gulf Stevedores,** 9 BRBS 855 (1979). As the Special Fund acted unilaterally, with full knowledge of its obligations under Judge Dunau’s decision, I find no exculpatory circumstances herein warranting the exception carved out by the Board in **Davenport v. Apex Decorating Co.,** 13 BRBS 1029 (1981). The Director, OWCP, is aware of this proceeding and has not

participated herein. (ALJ EX 8) Thus, the Director's position shall await another day.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after December 3, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days and Employer's counsel shall have fourteen (14) days to comment thereon.

Pursuant to the Board's decision in **Bingham v. General Dynamics Corporation**, 20 BRBS 198 (1988), the Employer, not the Special Fund, is responsible for the attorney fee to be awarded to the Claimant.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Special Fund established in Section 44 of the Act and until further Order, shall pay to Claimant compensation for his permanent partial disability at the weekly rate of $47.67, as provided by Sections 8(c)(21) and 8(h) of the Act, and such benefits shall begin on March 3, 1996, the date on which they were terminated.

2. As of May 4, 1999, the Special Fund shall pay to the Claimant benefits for his permanent partial disability at the rate of $1.00 per week.

3. Interest shall be paid by the Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall continue to furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. The Special Fund shall pay to Claimant additional compensation at the rate of twenty (20) percent, pursuant to Section 14(f) of the Act, based upon installments due between March 6, 1996 and the date on which benefits are reinstated.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on December 3, 1997.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated: May 4, 1999
Boston, Massachusetts
DWD:dr